SUPREME COURT, U. S.

FEB 6 1974

MICHAEL RODAK, JR., CLERK

No. 73-741

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE FIFTH AVENUE PEACE PARADE COMMITTEE ET AL., PETITIONERS

v.

CLARENCE M. KELLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners, an unincorporated association and certain members thereof, brought suit in the United States District Court for the Southern District of New York against the Director of the Federal Bureau of Investigation ("FBI"), the Assistant Director in charge of the FBI offices in New York City, and the Amalgamated Bank of New York, the bank in which the association had deposited funds. They sought (1) a declaration that the FBI's investigation of them, including an inspection of their bank records, violated their First, Fourth, and Ninth Amendment rights, (2) an injunction against further investigation or further dissemination of the investigative reports, and (3)

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destruction of the pertinent files. After a nonjury trial, the district court made oral findings of fact and conclusions of law (Pet. App. 23a–35a), and dismissed the complaint on the merits. A divided court of appeals affirmed (Pet. App. 1a–14a).

The investigation was conducted in connection with the Viet Nam Moratorium demonstration in Washington, D.C. in November 1969, of which the petitioner association was one of the sponsors. The purpose of the investigation, as both the court of appeals and the district court found, was to estimate the number of persons who would be attending the demonstration in order to make adequate preparations to assure its peaceable nature, and to determine whether any of the demonstrators were persons having a "potential record of violence" (see Pet. App. 4a, 10a–11a, 29a–30a).

Although the complaint broadly alleged that the FBI had made a full examination of the association's bank records, surveilled and photographed individuals who boarded buses in New York to attend the demonstration, and prepared dossiers on such individuals and others affiliated with the association, the district court found that the FBI made no effort to ascertain the identities of those who boarded the buses (Pet. App. 31a), took no photographs and compiled no dossiers (Pet. App. 32a). The court found that the FBI did no more than ascertain the size of the association's bank account and an affiliated account, incidently learning names of the persons authorized to sign checks thereon (Pet. App. 27a–28a), and surveil the departing buses only to the extent of ascertaining the number of persons boarding and the number of buses

leaving (Pet. App. 31a). While petitioners also alleged that a two hundred page summary of the investigation was "broadly" disseminated, the court found that it was distributed only to relevant government agencies, that it covered all investigative activities conducted in connection with the demonstration, and that only certain pages of the summary pertained to petitioners.[1]

Petitioners' contention that the government acted unlawfully in conducting this limited investigation and including its results in the dissemination to relevant government agencies was fully considered and properly rejected by the court of appeals, upon whose opinion we rely.

The court of appeals, relying on *Laird* v. *Tatum*, 408 U.S. 1, also held that petitioners had not presented a justiciable question. Petitioners point out that in *Laird* v. *Tatum* the respondents' challenge was directed at "the existence and operation of the [Army's nationwide] intelligence gathering * * * system" (408 U.S. at 3), and petitioners seek to distinguish *Laird* v. *Tatum* on the ground that its holding is confined to generalized challenges to government activity. In contrast, petitioners describe their claims as "individualized" (Pet. 13).

Petitioners, however, have misconceived the thrust of this Court's opinion in *Laird* v. *Tatum*. Like petitioners, the respondents in *Laird* v. *Tatum* were the subject of surveillance (408 U.S. at 39), and they, like

[1] This summary report in its entirety was reviewed by the district court *in camera* prior to making findings of fact (Pet. App. 32a–35a).

petitioners, did not claim that they had sustained or were "immediately in danger of sustaining a direct injury as the result of that action." This Court held that such a showing is prerequisite "to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action." 408 U.S. at 13.

Petitioners claim that they are intimidated by the knowledge that the FBI file is still maintained and disseminated (Pet. 13). The district court found, as noted earlier, that the FBI compiled no dossiers and took no photographs, and disseminated a report, only a small part of which referred to petitioners, solely to relevant government agencies. Petitioners thus simply make "[a]llegations of a subjective 'chill' " and as this Court held in *Laird* v. *Tatum,* such allegations "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 13–14.[2] See *Donohoe* v. *Duling,* 465 F. 2d 196 (C.A. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2] Petitioners' challenge to the FBI's limited inspection of its bank account records is without merit. Whatever restrictions may exist on the government's power to compel such disclosure, and whatever standing petitioners would have to challenge government-compelled inspection of records in the hands of third parties (See *Donaldson* v. *United States,* 400 U.S. 517), in the present case petitioners' bank voluntarily disclosed information to the FBI.

U.S. GOVERNMENT PRINTING OFFICE: 1974